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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

BYRON MCCORD FAIRBANKS,

Defendant and Appellant.

A152350

(Contra Costa County
Super. Ct. No. 5-160675-5)

Byron McCord Fairbanks appeals after a jury convicted him of voluntary manslaughter (Pen. Code, § 192, subd. (a); count one), a lesser included offense of murder, and felon in possession of a firearm (*id.*, § 29800, subd. (a)(1); count two). Fairbanks argues the trial court erroneously excluded evidence the victim had been diagnosed with schizophrenia and gave a jury instruction not supported by substantial evidence. We affirm.

BACKGROUND

A.

In 2016, Fairbanks was convicted on count two, but a mistrial was declared as to count one after the jury was unable to reach a verdict. Retrial on the murder charge began in 2017.

B.

On the afternoon of June 1, 2015, Fairbanks, Fairbanks's girlfriend Kimberly Hoglund, Henry Perez, Donald Voshall, and Robert Fitch were at Perez's home in Richmond, where Perez sold drugs.

Voshall, who was a regular user of heroin and methamphetamine and had ingested heroin that morning, saw Hoglund go into the bathroom, right off the kitchen, and close the door. Fairbanks went in and out of the bathroom but at one point joined Fitch and Voshall in the living room. Fitch repeatedly asked Fairbanks in a conversational tone if Fairbanks “had a problem with [him]?” Fairbanks said, “no.” Fitch did not threaten Fairbanks.

Voshall moved outside the open front door but could still see Fitch and Fairbanks. When Fitch asked Fairbanks for water, Fairbanks entered the bathroom and filled Fitch’s cup. Fitch looked in the glass and asked in a loud and angry voice, “[W]ho spit in my water[?]” Fairbanks said, “nobody spit in your water,” returned to the bathroom, and shut the door. Fitch remained in the kitchen, facing the bathroom, but making no attempt to enter it. Voshall saw Fairbanks’s arm emerge from the bathroom, holding a gun only three to four feet off the ground, and then, a “[s]plit second” later, heard a gunshot. Fitch ran from the house, and Fairbanks and Hoglund left shortly afterwards. Voshall did not see Fitch with a weapon or observe Fitch moving aggressively against Fairbanks.

A neighbor heard Fitch’s call for help, saw Fitch bleeding profusely, and called 911. Before losing consciousness, Fitch said he “got in a fight” and had been “shot.” The neighbor also saw Fairbanks and a woman walk by. They looked at Fitch but kept walking. Fairbanks said, “I had nothing to do with that.”

Fitch died as a result of a single gunshot wound that transected his femoral artery. The absence of stippling and soot on Fitch’s body and pants suggested the shot was fired from more than 18 inches away. Police found the gun hidden under a bush one block from Perez’s home.

Testifying in his own defense, Fairbanks admitted shooting Fitch but in self-defense. Fairbanks admitted using methamphetamine regularly and heroin occasionally. He also admitted two prior felony convictions for assault. Although he knew he was not legally permitted to possess a firearm, Fairbanks brought his uncle’s gun with him to Perez’s house, as well as a knife and a stun gun. He took the gun for protection against two men in the neighborhood (not Fitch), who had threatened him.

When Hoglund went in Perez's bathroom to use heroin, according to Fairbanks, Fitch initially tried to join her. Fairbanks surrendered his gun to Perez, sold Perez the stun gun, and then talked with Fitch and Voshall in the foyer. Despite Fairbank's assurances, Fitch repeatedly shouted at him, "You got a . . . problem with me . . . , [Fairbanks]?" Concerned that a man he did not know was antagonizing him, Fairbanks retrieved his loaded gun, chambered a round, put it in his waistband, and entered the bathroom. Fairbanks was not planning to shoot Fitch but does not "underestimate anybody."

Fitch knocked on the bathroom door, demanding water. Fairbanks filled Fitch's cup, returned it, and closed the bathroom door again. Fitch then banged on the door, yelling, "who the fuck spit in my cup?" When Fairbanks assured him no one had, Fitch brandished a fork close to Fairbanks's face and said, "motherfucker, that's spit." Fairbanks pushed Fitch's hand with the fork away and closed the bathroom door. Fitch continued yelling. Hoglund told Fitch, through the door, no one had spit in his cup. Fitch called Hoglund a "piece of shit" and told her, "I'll handle you too."

Believing it was time to leave, Fairbanks stepped out of the bathroom. Fitch lunged at him with a fork in his hand. Worried that Fitch was going to stab him or Hoglund with the fork, Fairbanks pulled his gun, fired it once, and ran from the house. He was not trying to kill Fitch and did not know if the bullet had struck him. Feeling panicked, Fairbanks hid the gun under a bush, took his shirt off to change his appearance, and initially denied any involvement in the shooting when questioned by police.

Several defense witnesses testified regarding Fitch's character for violence. (See Evid. Code, § 1103, subd. (a).)¹ In 2012, a sheriff's deputy observed Fitch yelling obscenities and banging his head against a cell wall. Fitch tried to punch the deputy. Three years later, another deputy saw Fitch attack his cellmate. In 2011, when Fitch was asked to leave his grandmother's home, Fitch struck and threatened to kill his stepgrandfather and choked his sister. Fitch left when his stepgrandfather brandished a

¹ Undesignated statutory references are to the Evidence Code.

handgun. That same year, when Fitch’s stepmother asked him to move out, he grabbed her by the neck and pinned her against a door.

Dr. Anna Glezer, a psychiatric expert, opined the levels of methamphetamine found in Fitch’s blood at the time of death could have increased his risk of delusions, hallucinations, and violent behavior.

C.

The jury was instructed on justifiable homicide, first and second degree murder, and voluntary manslaughter on heat of passion and imperfect self-defense theories. The jury acquitted Fairbanks of murder but found him guilty of the lesser included offense of voluntary manslaughter (Pen. Code, § 192, subd. (a)) and found true a firearm enhancement allegation (*id.*, § 12022.53, subd. (d)). Finding that Fairbanks had two prior serious or violent felony convictions (*id.*, §§ 667, subds. (d)–(e), 1170.12, subds. (b)–(c)) and four prior felony convictions (*id.*, § 667.5, subd. (b)), the trial court sentenced him to an indeterminate term of 25 years to life on count one. Punishment on count two, as well as on the enhancements for his prior prison terms (*id.*, § 667.5, subd. (b)), was stayed pursuant to Penal Code section 654.

DISCUSSION

A.

Fairbanks argues the trial court violated state law and his federal constitutional rights to a fair trial, due process, and to present a defense by excluding testimony regarding Fitch’s mental illness. We disagree.

1.

The federal Constitution guarantees criminal defendants “ ‘ ‘ ‘a meaningful opportunity to present a complete defense.’ ’ ’ ” (*Nevada v. Jackson* (2013) 569 U.S. 505, 509.) But, “ ‘ [a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense.’ ” (*People v. Dement* (2011) 53 Cal.4th 1, 52, disapproved on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) “ ‘ Although completely excluding evidence of an accused’s defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary

point does not impair an accused's due process right to present a defense.' ” (*People v. Boyette* (2002) 29 Cal.4th 381, 428.) “While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326.)

We review evidentiary rulings for abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) “ ‘Under the abuse of discretion standard, “a trial court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” ’ ” (*Id.* at pp. 1328–1329.)

2.

At the outset of the second trial, Fairbanks offered the testimony of a psychiatrist, Dr. Jinou Parvizi, who treated Fitch at Atascadero State Hospital in 2014 and 2015. The defense sought to have Parvizi testify Fitch was diagnosed with paranoid schizophrenia and suffered paranoid psychotic episodes. Defense counsel also proposed to ask Parvizi hypothetical questions to suggest that someone who had taken methamphetamine, had been diagnosed with paranoid schizophrenia, and was acting as Fitch was on the day of the shooting, was likely suffering from psychosis. The People objected on prejudice and relevance grounds, stating the defense was “trying to use [the victim’s] mental illness against him to suggest . . . he deserved to be killed.” (See §§ 210, 350, 352.)

Fairbanks conceded he had no knowledge Fitch had any mental illness at the time of the shooting; the two were unacquainted. The trial court tentatively concluded the evidence was inadmissible on that basis, explaining, “If this is going toward[] a self-defense [claim], it’s what’s in [Fairbanks’s] mind based on what he is experiencing in that moment, not what may be going on in [Fitch’s] mind.”

The matter came up again after Fairbanks testified. Defense counsel noted Parvizi had not witnessed any violence. The trial court excluded the evidence, stating that,

without Parvizi having observed any physical violence from Fitch, the cause of Fitch's paranoid behavior was irrelevant. Additionally, the court reiterated that the testimony is irrelevant to the jury's determination of self-defense, given that Fairbanks was unaware of Fitch's mental problems.

3.

Fairbanks insists the evidence was relevant to his self-defense claim. Specifically, he contends "a critical question before the jury was why did Fitch behave as described by appellant?" Fairbanks says that Dr. Parvizi's testimony provided the answer: Fitch "likely attacked [Fairbanks] during a psychotic break," exacerbated by methamphetamine. This evidence would have bolstered Fairbanks' credibility and helped him demonstrate that his response to the attack was reasonable and appropriate.

Fairbanks is correct, of course, that to establish self-defense the jury was required to determine whether his actions were reasonable. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) "[T]he defendant must actually and reasonably believe in the need to defend," in which case the defendant acted without the malice required for murder. (*Ibid.*) The defendant can establish perfect self-defense if his belief is both sincere and objectively reasonable; imperfect self-defense requires the defendant's belief to be sincere but objectively *unreasonable*. (*Ibid.*) A jury must consider what actions would appear necessary " 'to a reasonable person in a similar situation and with similar knowledge.' " (*Id.* at pp. 1082–1083.)

The flaw in Fairbanks's argument is that he was unaware of Fitch's mental health problems. The proposed evidence of the victim's state of mind was therefore irrelevant. (See *People v. Cash* (2002) 28 Cal.4th 703, 726 [victim's past use of violence in collecting debts not relevant to show defendant's state of mind unless defendant knew of these practices at time of killing].) The jury was properly instructed to "consider all the circumstances as they were known to and appeared to the defendant." (CALCRIM No. 505, 571.) Fairbanks cites no authority to support his assertion that the jury was required to determine why Fitch behaved as he did. Whether Fitch was psychotic or simply ill-tempered is immaterial.

The trial court did not abuse its discretion in sustaining the People's relevance objection. Its routine application of state evidentiary law did not violate Fairbanks's constitutional rights.

B.

Fairbanks maintains the trial court erred by instructing the jury that “[a] person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.” (See CALCRIM No. 3472.) Assuming the instruction could affect Fairbanks's substantial rights, we will review his argument even though no objection was raised below. (See Pen. Code, § 1259.) We independently review claims of instructional error. (*People v. Guivan* (1988) 18 Cal.4th 558, 569.) Here, we find any error was harmless.

Our Supreme Court has approved, as a correct statement of the law, an instruction using substantially the same language as CALCRIM No. 3472. (*People v. Enraca* (2012) 53 Cal.4th 735, 761–762 [CALJIC No. 5.55].) Fairbanks asserts substantial evidence did not support the instruction and the jury may have been misled to believe he was foreclosed from raising self-defense. “It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

The People argue the instruction was supported by substantial evidence because Voshall testified he never saw Fitch with a weapon or moving aggressively and a jury could find Fairbanks was the initial aggressor when he fired his gun. It is not a very convincing argument. The instruction contemplates a situation where the defendant does something to provoke the victim so that the defendant has an excuse to use force. The People do not identify a provocation separate from the use of force itself (firing the gun).

But assuming the instruction was unsupported, it had no bearing on the outcome. (See *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1335; *People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) The jury was instructed, consistent with CALCRIM No. 200: “Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting

anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.” If there was no evidence that Fairbanks provoked Fitch, we are confident the jury ignored the instruction on provocation. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381 [instructing jury with CALJIC No. 5.55 was harmless when jury was instructed to disregard instructions irrelevant under facts found].)

Moreover, we do not see how the instruction could have made a difference on Fairbanks’s self-defense theory. The evidence is overwhelming that Fairbanks used more force than was reasonably necessary to defend himself against a person with a fork, particularly given his testimony that, prior to the shooting, when Fitch stuck the fork in his face, Fairbanks simply pushed Fitch’s hand aside and closed the bathroom door. (See CALCRIM No. 505.) Had the CALCRIM No. 3472 instruction been omitted, it is not reasonably probable Fairbanks would have obtained a more favorable result.

DISPOSITION

The judgment is affirmed.

BURNS, J.

WE CONCUR:

JONES, P. J.

SIMONS, J.

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